

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

KEVIN HUNTER and CORPORATE SPORTS,
LLC, Plaintiffs

v. No. 1:98CV368-B

SCOTT BARBOUR and TURBINE SOLUTIONS,
INC., Defendants

OPINION

This matter is presently before the court on the motion of defendant Turbine Solutions, Inc. (Turbine) to dismiss said defendant as a party to this action pursuant to Rules 12(b)(2) and 12(b)(6), FRCP. Turbine contends it is not a party to the Agreement which gives rise to this action and that this court lacks personal jurisdiction over Turbine.

On a motion to dismiss for lack of personal jurisdiction, the plaintiff need only present a prima facie case of personal jurisdiction. First Mississippi Corporation v. Thunderbird Energy, Inc., 876 F.Supp. 840, 841 [citing Trinity Industries, Inc. v. Myers & Associates, Ltd., 41 F.3d 229, 230 (5th Cir. 1995) (citing Wilson v. Belin, 20 F.3d 644 (5th Cir.) (cert. den. ___ U.S. ___, 115 S.Ct. 322, 130 L.Ed.2d 282 (1994))]. As Judge Barbour noted in First Mississippi, supra, this court must accept as true the uncontroverted allegations in the complaint and resolve in favor of the plaintiff any factual conflicts posed by the affidavits. Id.

A defendant is subject to personal jurisdiction in a diversity case in federal court to the extent permitted by the state in which the federal court sits. Cycles, Ltd. v. W.J. Digby, Inc., 889 F.2d 612, 615 (5th Cir. 1989). Plaintiffs in this action seek to impose jurisdiction over Turbine pursuant to Mississippi's Long Arm Statute, §13-3-57, Miss.Code of 1972, as Amended. Under that statute a court may properly exercise jurisdiction over a non-resident corporation which makes a contract with a resident of Mississippi to be performed in whole or in part by any party in Mississippi, so long as the exercise of such jurisdiction comports with constitutional requirements of due process. First Mississippi Corporation v. Thunderbird Energy, Inc., supra.

This court's analysis of the issue begins with a review of the complaint. Paragraph 4 of the Complaint alleges that Turbine is a Florida corporation, "... doing business in the state of Mississippi and is subject to the Mississippi Long Arm Statute due to breach of contract or commission of a tort within the state of Mississippi." Complaint, ¶4. The complaint further alleges that Turbine breached the terms of an agreement entitled "Letter of Intent And Agreement" (Agreement) attached to the Complaint. It is alleged that defendant Scott Barbour (Barbour) authored the Agreement. The face of the agreement attached to the complaint indicates it was transmitted by defendant Barbour to plaintiff Kevin Hunter (Hunter) "... Via Facsimile," but there is no allegation in the complaint nor any indication on the face of the document to indicate where it originated or where it was transmitted.

Paragraph 2 of the Agreement provides:

Scott G. Barbour agrees to purchase twenty percent (20%) membership interest in Corporate Sports, LLC for \$500,000.00, payable in two installments of \$250,000.00. The first installment is due on August 14, 1998 and the second installment is due on September 10, 1998. The purchase is conditioned on the terms of this Letter of Intent.

Other provisions of the Agreement which have some bearing upon the issue at hand provide as follows:

However, I [Barbour] understand that you [Hunter] do not want to bind Corporate Sports, LLC prior to closing and are signing this individually.

* * *

7. Once executed, this Agreement will be binding on the heirs, successors and assigns of Mr. Barbour and Mr. Hunter. In the event any dispute arises as to this Letter of Intent, the laws of the state of Florida shall govern.

The Agreement concludes with the signature of Barbour followed by the words, "Acknowledged and agreed to by Kevin Hunter" and bearing the signature of Kevin Hunter. To the right of the signature of Kevin Hunter there appears in unidentified handwriting, "Chairman/CEO Corporate Sports, LLC," all of which is lined through.

Attached to Turbine's Motion to Dismiss is the affidavit of Herman Vidal, a resident of Florida and president of Turbine, a Florida corporation with its principal place of business

in Brooksville, Florida. Vidal avers that Turbine conducts no business activity in Mississippi, owns no real or personal property located in Mississippi, has no office, place of business or telephone listing in Mississippi, has no agents, salesmen, representatives or employees in Mississippi, has no bank accounts or other assets in Mississippi, and is not a party to any contracts to be performed in whole or in part in Mississippi. Vidal further avers that Turbine solicits no orders, contracts or other business transactions in Mississippi, either through sales persons or through advertising, has no contracts with anyone for the purchase or sale of merchandise, products, services or goods within Mississippi, and has not instituted any action or proceeding against any other party in the state or federal courts in the state of Mississippi.

In response to Vidal's affidavit, Hunter avers, "At all times during my negotiations with Scott Barber [sic], it was my understanding that Mr. Barber [sic] was acting in his official capacity with Turbine Solutions, Inc. as well as in an individual capacity." The Hunter affidavit offers no rebuttal to the averments of the Vidal affidavit.

Plaintiffs contend that Turbine is a party to a contract to be performed in whole or in part in Mississippi, as contemplated by the state's Long Arm Statute. In support of this argument, plaintiffs cite what they contend are the identical facts in First Mississippi Corporation v. Thunderbird, Inc., *supra*. In First Mississippi, a stock purchase agreement, promissory note and escrow agreement which were at issue in the lawsuit, called for payments to be made in Mississippi and periodic financial and operating reports to be made in Mississippi. 876 F.Supp. at 842. In addition, in the forum selection clause of the escrow agreement, the parties agreed any lawsuit arising from the agreement could only be filed in Mississippi, and the non-resident party consented to service of pleadings issued in Mississippi. *Id.* The court held these factors constituted performance "in whole or in part" in Mississippi. *Id.* The Agreement in the case at hand provides that Florida law shall govern disputes arising from the Agreement. Otherwise, the Agreement is silent with regard to the factors enumerated in First Mississippi.

The only evidence offered by plaintiffs to support their claim that Turbine was a party to the Agreement is the Hunter affidavit which states it was his "understanding" that Barbour was acting on behalf of Turbine. There is nothing in the Agreement itself to lend support to this

understanding. To the contrary, there are express provisions which clearly suggest otherwise. The signature of Barbour is as an individual, as is Hunter's. The Agreement acknowledges Barbour's understanding that Hunter's signature does not bind Corporate Sports, LLC and binds only Hunter individually. The Agreement does not call for the performance of any conditions by Turbine, and, perhaps most significantly, the Agreement expressly binds the heirs, successors and assigns of Barbour and Hunter.

The express terms of the Agreement and the signatures affixed to it lead inescapably to the conclusion that Barbour and Hunter are the only parties to the Agreement. As Turbine is not a party to a contract to be performed in whole or in part in Mississippi, and as plaintiffs have shown no contacts between Turbine and the state of Mississippi, the court is led to the inescapable conclusion that it may not exercise personal jurisdiction over Turbine. Accordingly, the motion of Turbine for dismissal as a party to this action shall be granted by an order of even date herewith.

THIS, the ____ day of _____, 1999.

CHIEF JUDGE

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FINAL JUDGMENT

In accordance with an Opinion entered this day, it is hereby ordered and
adjudged:

1. That the Motion to Dismiss of defendant Turbine Solutions, Inc., be, and
it is hereby, granted.

2. That all of plaintiffs' claims against defendant Turbine Solutions, Inc. be,
and are hereby, dismissed with prejudice.

SO ORDERED, this, the ____ day of _____, 1999.

CHIEF JUDGE